STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1285

David Jackson Associates, Inc.,
Appellant,

vs.

Internet Broadcasting Systems, Inc., et al.,
Respondents.

Filed May 25, 2010
Affirmed in part, reversed in part, and remanded
Peterson, Judge

Ramsey County District Court
File No. 62-CV-08-2649

Timothy J. Nolan, Emily J. Piper, Joelle M. Lester, McGrann Shea Carnival Straughn & Lamb, Minneapolis, Minnesota (for appellant)

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Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Shumaker, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

On appeal from summary judgment in this lien dispute, appellant argues that (1) fact issues existed regarding whether it had a contract with respondent and the terms of that contract, (2) to not allow appellant to collect from respondent will result in the

unjust enrichment of respondents, and (3) appellant has a mechanic's lien against respondent's property as a result of the services that appellant provided. We affirm in part, reverse in part, and remand.

FACTS

From April 17, 2006, until late June 2007, appellant David Jackson Associates, Inc. (DJA), and The Staubach Company were parties to an independent-contractor salesperson agreement (Jackson/Staubach agreement).[1] The Staubach Company, which is not a party to this action, is a global real estate advisory firm that helps clients find and acquire office space. Under the Jackson/Staubach agreement, David Jackson served as Staubach's Vice President – Design and Consulting Services and was paid $8,000 per month with the opportunity to earn commissions based on the attainment of specified goals.

In late 2005, respondent Internet Broadcasting Systems, Inc. (IBS), hired Staubach to assist IBS in finding a new location for its corporate headquarters. Appellant's role was to provide IBS with price estimates for any build-out IBS would need to complete its office space. IBS selected a site known as the River Bend property. Staubach and IBS executed a project-management-services agreement (IBS/Staubach agreement) for the River Bend property, under which Staubach was to be paid $1.80 per square foot, about $140,000 total, for project-management services. The agreement contained a value guarantee, which states, "[I]f, in the opinion of [IBS], [Staubach] has not provided value,

[1] Although the agreement lists David Jackson, not appellant, as a party, for purposes of the summary-judgment proceeding, respondents accept appellant's assertion that the agreement was actually between Staubach and appellant.

in terms of time, money, and qualitative issues, in excess of the cost of the Services, [Staubach] will waive all or part of the fees it is to receive pursuant to this Agreement."

During negotiations on the River Bend property, Staubach had told IBS that if IBS negotiated a $30/square foot tenant-improvement allowance, it would cover the cost of improvements that IBS needed to make to the property. IBS relied on that figure in negotiating the tenant-improvement allowance for the River Bend property lease. The build-out began in May 2007, and within one month, IBS realized that the build-out cost had been underestimated. A revised estimate prepared by appellant showed a build-out cost exceeding $50 per square foot. The error resulted in a $1.5 million cost increase to IBS for the 78,500 square-foot facility. Both David Foley of Staubach and David Jackson admitted that appellant made errors in the initial estimate.

On June 13, 2007, Jackson sent an e-mail to IBS's Chief Financial Officer Steve Johansen stating:

> I want to offer my fee of $1.80 per square foot ($141,840.00) as a cost reduction for the project budget.
>
> Simply put I feel obligated. I assure you I will complete the project with the same approach and zeal.
>
> I value my relationship with IBS more so [than] the fee. Tomorrow's budget revision will reflect this change.

The following day, Jackson sent Johansen an e-mail stating:

> Here you go and the offer is real. Frankly we should have slowed the process [down] and gotten our collective arms around the project, its design, scope and real numbers.

> Having said that, the offer stands and I won't walk away. I have an obligation to all of those firms currently working with us, as well to IBS.

Attached to this e-mail was a revised project-cost summary showing that the cost for "Staubach DCCS Project Management" had been deleted.

Tad Jellison stated in an affidavit that due to the hardship caused to IBS by appellant's underestimation of IBS's build-out costs, Jackson agreed, on behalf of Staubach, to waive Staubach's entire project-management-services fee and that appellant, on behalf of Staubach, agreed to complete the project-management work on the project at no cost. Jellison also stated that at about the same time, Staubach and appellant decided to terminate their relationship, and Jackson indicated that he would complete the project for IBS himself, still at no cost to IBS. By letter dated June 22, 2007, Staubach and IBS terminated their project-management-services agreement, and Staubach waived the entire $140,000 ($1.80/sq. ft.) project-management-services fee. Jackson signed the letter on behalf of Staubach.

Johansen stated in an affidavit:

> Jackson assured me again that despite him leaving Staubach, he would make good on his promise to complete the project at no cost. Because [IBS] could not possibly bring on new project management at this stage of the project and because Jackson promised to continue to do the work at no cost, [IBS] agreed to let him do so.
>
> . . . .
>
> . . . During the time from late-June and into September, [IBS] and Jackson had exchanged drafts of a writing intended to memorialize the agreement that Jackson would complete the project management work for no cost.

> The drafts exchanged were based on the Staubach/[IBS] Project Management Services Agreement. Those drafts stated that Jackson "shall provide the services for $1.00 and other good and valuable consideration hereby acknowledged and received."

On November 16, 2007, Jackson sent Johansen an e-mail referring to the unsigned agreement and also stating:

> The initial Staubach Agreement . . . noted compensation at $1.80 per square foot or $141,840.00 and we agreed to set that aside, then terminated that agreement and completed the project on a "handshake" as the project took precedent. I will complete the project close out and continue to assist [IBS] when asked, but would like to come to an understanding on the invoice and ending my responsibilities.
>
> Based on our initial conversation regarding my fee, it's your call on what I reflect on the invoice.

Later that month, Jackson sent Johansen an invoice describing the services as "Project Management Consulting Services New Corporate Headquarters" and listing the amount as "1.00."

Jackson testified in a deposition:

> Q: . . . Was that dollar invoice for all the work completed up to the date of the invoice?
> A: Well, I believe they – I believe the invoice asked or had actually some verbiage included with it with regards to the one dollar, but that would have been for the project for the Internet Broadcasting project, yes.
> Q: For all the work you did on the Internet Broadcasting project up to the date of the invoice?
> A: Correct.
> Q: . . . What was this other verbiage you mentioned?
> A: I believe that the invoice reflects verbiage that there's one dollar and other good and owing considerations or due and owing considerations. We had developed some language in the agreement, the one that was never signed, to provide

> Internet Broadcasting with a broad opportunity with regards to the fee, an interpretive opportunity with regards to the fee so that Mr. Johansen and I could reconcile what value of service I delivered to him for this project.
> . . . .
> Q: . . . Didn't you testify earlier today that you and Mr. Johansen agreed to – in June, at this June 20, 2007 meeting, you said that you and Mr. Johansen agreed to $139,507. Is that correct, sir?
> A: No, that is not correct. . . .
> . . . .
> A: I believe what I stated earlier was that we had a general understanding that the fees that were identified between the Staubach of Minnesota and Internet Broadcasting contract that was eventually terminated, would be applicable here.
> Q: So $1.80 a square foot was going to be the fee?
> A: Correct.
> . . . .
> Q: . . . So your answer to this interrogatory, where you say the compensation amount was open, are you saying that's incorrect?
> A: No.
> Q: How does that jibe with the $1.80 a square foot then?
> A: Again, the June conversation with Mr. Johansen was clear that we would carry forward and continue to reflect on the project budget that amount which was reflected in the Staubach of Minnesota contract between [IBS] and Staubach of Minnesota for project management services.
> Q: So how was the amount left open?
> A: The agreement with Mr. Johansen and Ms. Bilcik was that we would not specifically fix the fee because they were over – because they were looking at their budgets and their capital dollars in terms of what they had internally budgeted, and they were over budget, and I agreed to provide a degree of latitude in resolving and closing my compensation at the end of the project.

Jackson testified that IBS had never agreed to a precise number and that the agreement was for an amount "somewhere in between $1.00 and $139,507.20."

On March 6, 2008, appellant filed a mechanic's lien against the River Bend property in the amount of $139,506.20 for work performed from November 6, 2007, through February 11, 2008. Appellant then began this lawsuit alleging a mechanic's lien foreclosure claim and an unjust-enrichment claim against IBS and respondent River Bend Ventures I, LLC, and a breach-of-contract claim against IBS. The district court granted summary judgment for respondents. This appeal followed.

D E C I S I O N

On appeal from summary judgment, we review the record to "determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). A genuine issue of material fact exists if the evidence would "permit reasonable persons to draw different conclusions." *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). We view the evidence in the record "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

I.

To establish that a contract existed, a plaintiff must prove a valid offer, acceptance, and consideration. *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008). A contract requires agreement "with reasonable certainty about the same thing and on the same terms." *Peters v. Mut. Benefit Life Ins. Co.*, 420 N.W.2d 908, 914 (Minn. App. 1988). There must be a "meeting of the minds concerning [the alleged agreement's] essential elements." *Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980).

Issues of contract formation are generally fact questions for the jury, but judgment as a matter of law is appropriate when there is no dispute over relevant facts. *Estate of Peterson*, 579 N.W.2d 488, 490 (Minn. App. 1998), *review denied* (Minn. Aug. 18, 1998).

A contract is void if it is so vague, indefinite, and uncertain that the contract's meaning and the parties' intent is left to speculation. *King v. Dalton Motors, Inc.*, 260 Minn. 124, 126, 109 N.W.2d 51, 52 (1961). A "purported contract is fatally defective" if it contains "substantial and necessary terms . . . specifically left open for future negotiation." *Id.*, 109 N.W.2d at 53. "When the parties know that an essential term of their intended transaction has not yet been agreed upon, there is no contract." *Malevich v. Hakola*, 278 N.W.2d 541, 544 (Minn. 1979).

Appellant claims that a contract existed based on the language "$1.00 and other good and valuable consideration hereby acknowledged and received" in the draft agreement prepared by IBS after termination of the IBS/Staubach project-management-services agreement. Appellant admits that the agreement was never executed but argues that the quoted language creates an ambiguity and the parties' conduct "very clearly indicates that both parties contemplated something other than $1 as appellant's compensation for eight months of work, as appellant was expected to manage and was held accountable for all facets of IBS' multi-million dollar build-out of its new headquarters." On review of summary judgment, we must accept Jackson's testimony that the parties had an understanding that appellant would be compensated for the services provided after termination of the IBS/Staubach agreement. But Jackson also

testified that IBS had never agreed to a precise number and that the agreement was for an amount "somewhere in between $1.00 and $139,507.20." Because the price term was left open for future determination, the district court properly concluded that no contract existed as a matter of law.

II.

A party is unjustly enriched when it knowingly receives something of value that it was not entitled to under circumstances that make it unjust for the party to retain the benefit. *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. App. 2001). Unjust enrichment requires unlawful or illegal conduct. *Custom Design Studio v. Chloe, Inc.*, 584 N.W.2d 430, 433 (Minn. App. 1998), *review denied* (Minn. Nov. 24, 1998).

Appellant argues that respondents were unjustly enriched because the majority of appellant's services were performed after termination of the IBS/Staubach and Jackson/Staubach agreements. It is undisputed that appellant provided services to IBS after termination of the IBS/Staubach and Jackson/Staubach agreements. Jackson's testimony that the parties had an understanding that appellant would be compensated for the services provided after termination of the IBS/Staubach agreement is sufficient to create a fact issue as to whether such an agreement existed and, thus, withstand summary judgment on appellant's unjust-enrichment claim. *See Holman v. CPT Corp.*, 457 N.W.2d 740, 745 (Minn. App. 1990) (reversing summary judgment dismissing unjust-enrichment claim when parties had not reached "full agreement concerning the details of compensation").

Based on the June 13, 2007, e-mail, the district court found that Jackson waived a fee for services performed after June 25, 2007. "Waiver has been defined as an intentional relinquishment of a known right, and while both knowledge and intention are essential elements, the knowledge may be actual or constructive and the intention can be inferred from conduct." *Stephenson v. Martin*, 259 N.W.2d 467, 470, (Minn. 1977). But the June 13 e-mail was sent when appellant was still associated with Staubach, and the revised project-cost summary submitted the following day by Jackson showed the cost for "Staubach DCCS Project Management" had been deleted. Respondents agree that the June 22, 2007, letter waiving the project-management fee was signed by Jackson on behalf of Staubach. Because the actions by Jackson on which respondents rely to support their claim of waiver occurred while Jackson was still associated with Staubach, Jackson's testimony that there was an agreement that appellant would be compensated for services performed after June 22, 2007, is sufficient to raise a fact issue as to waiver. *See Modern Heating and Air Conditioning, Inc. v. Loop Belden Porter*, 493 N.W.2d 296, 299 n.1 (Minn. App. 1992) (stating that "[g]enerally, the existence of a waiver is a question for the fact-finder and, thus, an inappropriate subject for summary judgment on contested facts").

The district court erred in granting summary judgment for respondents on appellant's unjust-enrichment claim.

III.

The district court concluded that appellant's mechanic's-lien claim fails as a matter of law because its monetary claims failed as a matter of law. Because fact issues exist on appellant's unjust-enrichment claim, this rationale no longer applies.

Respondents, alternatively, argue that the mechanic's-lien claim fails because the amount was overstated. A mechanic's lien may not be perfected "for a greater amount than the sum claimed in the lien statement, nor for any amount, if it be made to appear that the claimant has knowingly demanded in the statement more than is justly due." Minn. Stat. § 514.74 (2008). But an "honest mistake" or "mere failure to prove some items in the lien statement" is not enough to violate the statute. *Delyea v. Turner*, 264 Minn. 169, 175, 118 N.W.2d 436, 440 (1962). "To deprive the claimant of his right to a lien under this statute there must be a showing of fraud, bad faith, or an intentional demand for an amount in excess of that due." *Id.* The evidence in the record is insufficient to show fraud, bad faith, or an intentional demand for an amount exceeding that due as a matter of law.

Affirmed in part, reversed in part, and remanded.